

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF REVISING THE)
BOUNDARIES OF WATER DISTRICT)
NO. 120, AMERICAN FALLS AREA, IN)
ADMINISTRATIVE BASIN 27)
_____)

**PRELIMINARY ORDER
REVISING THE BOUNDARIES
OF WATER DISTRICT NO. 120**

The Director of the Idaho Department of Water Resources ("Director" or "Department") is required by Idaho statutes to divide the state into water districts for the purpose of performing the essential governmental function of distributing water among appropriators under the laws of the State of Idaho. The requirement to create water districts applies to those streams, or other water sources, for which the priorities of appropriation have been adjudicated by court decree. The Director is also authorized by statute to revise the boundaries of any water district in order to provide for the proper distribution of water among rights diverting and using the water. During the pendency of a water rights adjudication and pursuant to Idaho statutes, the district court having jurisdiction for the adjudication may authorize interim administration of the water rights by the Director under chapter 6, title 42, Idaho Code, if reasonably necessary to protect senior water rights, in accordance with partial decrees entered by the court or in accordance with a Director's Report with or without modification by the court's order.

FINDINGS OF FACT

1. On February 19, 2002, the Director issued an order creating Water District No. 120, pursuant to the provisions of Idaho Code § 42-604. The boundaries of Water District No. 120 were originally limited to ground water rights in administrative basins 35 and 41 overlying the Eastern Snake Plain Aquifer ("ESPA") in the American Falls Area that had been included in a Director's Report or partially decreed by the Snake River Basin Adjudication ("SRBA") District Court.

2. Holders of junior priority ground water rights in basins 25, 27, 29, 35, and 41 overlying the ESPA entered into written stipulated agreements with holders of senior priority surface water rights from the Snake River downstream of the American Falls area. The signatories to those agreements pledged to work with the Director to expeditiously create or revise the boundaries of water districts to implement the terms of the agreements.

3. On January 22, 2004, the Director issued an order revising the boundaries of Water District No. 120, pursuant to the provisions of Idaho Code § 42-604, to include ground water rights in that portion of Administrative Basin 29 overlying the ESPA.

4. On December 28, 2006, the Director issued an order revising the boundaries of Water District No. 120, pursuant to the provisions of Idaho Code § 42-604, to include ground water rights in a portion of administrative basin 25 overlying the ESPA, and a portion of Basin 35 overlying the ESPA located north of Roberts and the Bonneville-Jefferson Ground Water District. This area in Basin 35 had not previously been included in Water District No. 120.

5. On November 10, 2005, the State of Idaho filed with the SRBA District Court a motion requesting an order authorizing the interim administration of ground water rights (except those whose use is solely for domestic and/or stockwater purposes as defined under Idaho Code §§ 42-111 and 42-1401A(11)) by the Director in administrative basin 27. Copies of this motion were mailed to affected water right holders of record on November 10, 2005. The State's motion, supporting briefing, and affidavits are a part of the public record in the matter of revising the boundaries for Water District No. 120 within basin 27.

5. On December 21, 2006, the SRBA District Court issued an order authorizing the interim administration of water rights by the Director in basin 27, pursuant to chapter 6, title 42, Idaho Code.

6. On December 29, 2006, the Director mailed notice, by regular mail pursuant to the provisions of Idaho Code § 42-604, of the proposed action to further revise the boundaries of Water District No. 120 to include ground water rights within basin 27 overlying the ESPA. This notice was sent to all ground water right holders of record in Water District No. 120 affected by the proposed revision of the water district. A second notice of hearing was mailed on January 4, 2007 to each ground water right holder of record in that portion of basin 27 overlying the ESPA and affected by the proposed revision of the water district. Both notices described the proposed action to be taken, the reasons therefor, the time and place of a hearing to be held on January 29, 2006, concerning the proposed action, and provided a time period within which written comment on the action would be accepted.

7. On January 26, 2007, the Director appointed Tim Luke, a Department employee, as the hearing officer in this matter.

8. On January 29, 2007, at approximately 3:35 p.m., the hearing officer conducted the hearing on the proposed revision to the boundaries of Water District No. 120 at the Blackfoot City Council Chambers, 157 N. Broadway, Blackfoot, Idaho. Approximately 33 people attended the hearing.

9. Prior to commencing the hearing, the hearing officer spent approximately 90 minutes describing the background and purpose of the proposed action and addressing questions. The hearing officer also presented information concerning current and future operations of the District.

10. Persons attending the hearing were provided an opportunity to make oral statements for the record. In addition, the hearing officer held the record open through February 8, 2007, for the submission of written comments.

11. One individual presented oral statements for the record at the hearing in Blackfoot, Idaho.

12. Ms. Clarice Villa of the Shoshone-Bannock Tribal Water Commission presented testimony on behalf of the Tribal Water Commission and the Shoshone-Bannock Tribes ("Tribes"). Ms. Villa's testimony described the 1990 Fort Hall Indian Water Rights Agreement ("Agreement") between the Tribes, the United States, and the State of Idaho. Ms. Villa stated that the Agreement recognizes and respects the sovereignty of the parties with respect to administration of water rights owned by each of the parties as described in the Agreement and subsequently decreed by the SRBA District Court in 1994. Ms. Villa's testimony further stated that the Tribes feel it is crucial that the proposed boundary revision of Water District No. 120 does not interfere with the Tribes' ability to use or manage water on Indian lands pursuant to the Agreement, and that Water District No. 120 also does not interfere with the nature, scope or provisions of the Agreement. The Tribes also wished to remind the State of Idaho that the Agreement requires cooperation among the parties to monitor water use under the water rights in the Agreement to the same extent as required of other water users in Idaho. The Tribes further requested that the State of Idaho provide enforcement of non-Indian water rights and water uses within the water district to protect Tribal water rights.

13. The Department did not receive any written comments from affected water right holders or other interested parties prior to the close of the comment period on February 8, 2007.

14. The ESPA is defined as the aquifer underlying an area of the Eastern Snake Plain that is about 170 miles long and 60 miles wide as delineated in the report "Hydrology and Digital Simulation of the Regional Aquifer System, Eastern Snake River Plain, Idaho," U. S. Geological Survey ("USGS") Professional Paper 1408-F, 1992, excluding areas lying both south of the Snake River and west of the line separating Sections 34 and 35, Township 10 South, Range 20 East, Boise Meridian. The boundary of the ESPA is shown on the map included as Attachment A of this Order (labeled as the Eastern Snake Plain Aquifer).

15. The water supply from the ESPA is hydraulically connected to the Snake River and tributary surface water sources at various places and to varying degrees. Locations at which a direct hydraulic connection exists between the ESPA and the Snake River, or between the ESPA and water sources tributary to the Snake River, include the reach of the Snake River between Shelley and Minidoka (also known as the "American Falls reach"), located along the southeastern edge of the ESPA in the vicinity of Blackfoot, Idaho and American Falls Reservoir.

16. The Department uses a calibrated ground water model to determine the effects on the ESPA and hydraulically connected reaches of the Snake River and its tributaries from pumping a single well in the ESPA, from pumping selected groups of wells in the ESPA, and from surface water uses on lands above the ESPA.

17. The available water supply in all or portions of basin 27 overlying the ESPA have at times not been adequate to satisfy some senior priority water rights that are hydraulically connected to the ESPA. In the future, it is likely that the available water supply will be insufficient, at times, to satisfy these water rights.

18. Ground water rights in basin 27 overlying the ESPA and not included within Water District No. 120, currently are not subject to administration by a water district watermaster.

19. The administration of ground water rights within that portion of administrative basin 27 overlying the ESPA is necessary for the protection of prior surface and ground water rights.

CONCLUSIONS OF LAW

Statutory Authorities

1. Idaho law declares all surface water, when in natural channels or springs or lakes, and all ground water within the State of Idaho to be the property of the state, whose duty it is to supervise the appropriation and allotment of the water to those diverting the same for beneficial use. See Idaho Code §§ 42-101, 42-103, and 42-226

2. The Director, acting on behalf of the State of Idaho, has the statutory authority to control the appropriation and use of all surface and ground waters within the state in accordance with, but not limited to, Idaho Code §§ 42-101, 42-103, 42-202(1), 42-220, 42-226, 42-237a g, 42-351, and 42-602 et seq.

3. Idaho Code §§ 42-226 and 42-237a g, assign the authority and responsibility to the Director for the administration of ground water rights in the state in accordance with the prior appropriation doctrine as established by Idaho law so as to protect prior surface and ground water rights.

4. The Director has responsibility for direction and control over the distribution of water in accordance with the prior appropriation doctrine as established by Idaho law within water districts to be accomplished through watermasters supervised by the Director, and subject to removal by the Director, as provided in chapter 6, title 42, Idaho Code.

5. Idaho Code § 42-604 authorizes the Director to form water districts as necessary to properly administer uses of water from public streams, or other independent sources of water supply, for which a court having jurisdiction thereof has adjudicated the priorities of appropriation. The Director may also revise the boundaries of a water district, abolish a water district, or combine two (2) or more water districts, by entry of an order, if such action is required in order to properly administer the uses of the water resource.

6. In addition, Idaho Code § 42-1417 provides that the district court having jurisdiction over a general water rights adjudication may authorize the interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, prior to the entry of a final decree, in accordance with Director's Reports filed with the court, with or without modification by the court, or in accordance with partial decrees that have superseded the Director's Reports.

Response to Testimony and Written Comments

7. The only testimony provided was the oral testimony at the hearing on January 29, 2007, from Clarice Villa of the Shoshone-Bannock Tribal Water Commission, given on behalf of the Shoshone-Bannock Tribes. Ms. Villa also provided a written copy of her testimony to the Department at the hearing.

8. The Department acknowledges and respects the provisions of the 1990 Fort Hall Indian Water Rights Agreement. As described further in this Order, the proposed revision of the Water District No. 120 boundary is intended to extend administration and enforcement of water rights established under state law within and around the Fort Hall Indian Reservation to protect all senior priority water rights, including those owned by the Shoshone-Bannock Tribes and the United States pursuant to the Agreement.

Revision of District Boundaries

9. Based on the above statutory authorities, the order of the SRBA District Court authorizing interim administration of water rights pursuant to chapter 6, title 42, Idaho Code, and the record in this proceeding, the boundaries of Water District No. 120 should be revised to include administration of ground water rights, excluding those rights whose use is solely for domestic and/or stockwater purposes as defined under Idaho Code §§ 42-111 and 42-1401A(11), in that portion of basin 27 overlying the ESPA as shown on the map appended hereto as Attachment A, to protect senior priority water rights.

10. The water district with the revised boundaries should be used to administer the affected water rights in accordance with the prior appropriation doctrine as established by Idaho law.

Administration of Affected Water Rights

11. Immediate administration of ground water rights pursuant to chapter 6, title 42, Idaho Code, is necessary, other than for domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

12. The watermaster for Water District No. 120, with the boundaries as revised pursuant to this order, shall perform the following duties in accordance with the direction and supervision of the Director:

- a. Curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- b. Measure and report the diversions under water rights;
- c. Enforce the provisions of any mitigation plans or stipulated agreements approved by the Director;

- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or a mitigation plan approved by the Director; and
- e. Enforce the provisions of any stipulated agreements or mitigation plans approved by the Director.

13. Additional instructions to the watermaster for the administration of water rights from hydraulically connected sources will be based upon available data, models, and the Director's best professional judgment.

ORDER

IT IS HEREBY ORDERED that:

1. The boundaries of Water District No. 120 in the American Falls Area are revised to include all ground water rights within that portion of basin 27 overlying the Eastern Snake Plain Aquifer as depicted on the map appended hereto as Attachment A and incorporated herein by reference, except small domestic and stock water rights as defined under Idaho Code §§ 42-111 and 42-1401A(11) for which authorization for interim administration was not obtained from the SRBA District Court and for which notice of this action was not provided, and ground water rights administered by the Shoshone-Bannock Tribes and the United States pursuant to the 1990 Fort Hall Indian Water Rights Agreement.


2. The watermaster for Water District No. 120 shall perform the following duties in accordance with guidelines, direction, and supervision provided by the Director:

- a. Measure, collect, and record the diversions under water rights;
- b. Administer and enforce the water rights in order of priority;
- c. Curtail unauthorized or excessive diversions as necessary (i.e., any diversion without a water right or in excess of the elements or conditions of a water right);
- d. Curtail out-of-priority diversions determined by the Director to be causing injury to senior priority water rights if not covered by a stipulated agreement or mitigation plan approved by the Director; and
- e. Enforce the provisions of any stipulated agreements or mitigation plans approved by the Director.

3. The watermaster of Water District No. 120 shall, pursuant to guidance from the Director and in accordance with the 1990 Fort Hall Indian Water Rights Agreement, coordinate with the Shoshone-Bannock Tribes and the United States with respect to monitoring, reporting, and inspection of diversions within the Reservation.

4. Holders of water rights in that portion of basin 27 overlying the ESPA and included in Water District No. 120 are not subject to assessments by Water District No. 120 in 2007 since the district held its annual meeting prior to the issuance of this Order. These right holders shall be provided notice of all future annual meetings in accordance with Idaho Code § 42-605.

DATED this 15th day of March, 2007.


Tim Luke
Hearing Officer

RESPONDING TO PRELIMINARY ORDERS ISSUED BY THE IDAHO DEPARTMENT OF WATER RESOURCES

The accompanying order is a **Preliminary Order** issued by the Idaho Department of Water Resources (Department) pursuant to section 67-5243, Idaho Code. **It can and will become a final order without further action of the Department unless a party petitions for reconsideration within fourteen (14) days after issuance as further described below:**

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a preliminary order with the hearing officer within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3) Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of a preliminary order, (b) the service date of a denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing support or take exceptions to any part of a preliminary order and may file briefs in support of the party's position on any issue in the proceeding to the Director. Otherwise, this preliminary order will become a final order of the agency.

If any party appeals or takes exceptions to this preliminary order, opposing parties shall have fourteen (14) days to respond to any party's appeal. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the Director. The Director retains the right to review the preliminary order on his own motion.

ORAL ARGUMENT

If the Director grants a petition to review the preliminary order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. If oral arguments are to be heard, the Director will within a reasonable time period notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, request for oral argument and any other matters filed with the Director in connection with the preliminary order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Department will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The Department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for reconsideration. If a party has not filed a petition for reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

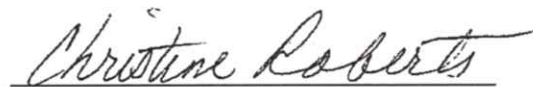
Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15 day of March, 2007, the above and foregoing document was served on each individual or entity on the service list for this matter on file at the Idaho Department of Water Resources, 322 East Front Street, Boise, Idaho, and posted on the Department's website: www.idwr.idaho.gov. Each individual or entity on the service list was served by placing a copy of the above and foregoing document in the United States mail, postage prepaid and properly addressed.



Christine Roberts
Technical Records Specialist
Idaho Department of Water Resources